

Water Pollution Control Advisory Council (WPCAC) Conference Call
November 2, 2006 10:00 a.m. – 11:30 a.m.
Director's Conference Room 111 Metcalf Building

Call to Order

Chairman Terry McLaughlin called the Water Pollution Control Advisory Council meeting to order on November 2, 2006 at 10:00 a.m.

Roll Call

Council Members Present: Terry McLaughlin (Chair), Karen Sanchez, Matt Clifford, Roger Muggli, Stevie Neuman, Earl Salley, Dude Tyler, Michael Wendland, Kathleen Williams.
A quorum is present.

Department Personnel Present: Bob Bukantis (Council Secretary) Water Quality Planning Bureau (WQPB), Planning, Prevention and Assistance Division (PPAD); Bonnie Lovelace Water Protection Bureau (WPB) Permitting and Compliance Division (PCD); Kari Smith WPB, PCD; Tom Reid, WPB, PCD; David Bowers, Hazardous Waste Site Cleanup Bureau, Remediation Division; Claudia Massman, Legal; Petrina Fisher (Administrative Support) WQPB, PPAD.

Approval of Agenda

Terry McLaughlin asked for additions or changes to the agenda. There was request to note that there is a typo on the agenda and the briefing items are at 10:20 and 10:40 and not at 12:20 and 12:40.

A motion to approve the agenda with the typo correction was made and seconded. The motion carried and the agenda was approved as corrected.

Approval of Minutes for August 31, 2006 Council Meeting

Terry McLaughlin asked for any corrections or edits to the August 31, 2006 meeting minutes.

Kathleen Williams requested a correction on page 5, the fifth paragraph down, about ORW management on existing ORWs, the second sentence should be changed to "It seems that DEQ is just now inventing the implementation process." It was not intended to assert that DEQ was reinventing anything and was intended to see why this seemed new when there were already ORW since 1994.

A motion to approve the August 31, 2006 minutes as changed was made and seconded. The motion carried and the August 31, 2006 minutes were approved as corrected.

Briefing/Update Items

Upper Blackfoot Mining Complex Update

Bob Bukantis said that DEQ initiated rulemaking and held a public meeting. The Board has not made a final decision on whether to adopt and strike out the Upper Blackfoot Mining Complex temporary standards or not. That decision will likely be made on December 1st at the Board meeting.

David Bowers said the public comment period started shortly after the Board initiated the rulemaking and culminated with a public meeting in Lincoln to take comment on September 18th. There were only two people present at the public meeting: a representative from ASARCO and a representative from ARCO. Only the representative from ASARCO, Chris Pfahl, gave public comment at the hearing.

ASARCO's comment can be summarized in three parts. The first issue addressed was the implementation plan and the reason for so many delays. Chris Pfahl's comment admitted that many of the delays can be attributed to ASARCO due to severe financial situations. Chris Pfahl also stated that the Forest Service could take some of the blame for the delays since it took USFS 3-4 years to negotiate the administrative order on consent to do the investigation on the Mike Horse Dam. Chris Pfahl singled out an example in which he felt DEQ was responsible for a delay in approving the work plan that was published for this year. The second issue was that ASARCO believed that the repeal will have little effect on moving this project forward other than affecting ASARCO's permit with the wastewater treatment system. ASARCO agreed that everything else will move forward regardless of an implementation plan and regardless of the temporary standards. The third issue made was that while everything will move forward, ASARCO believes there will be adverse consequences to lifting the temporary standards. An example given was that there would be no site-wide sampling that ASARCO has taken a lead on as one of the requirements of the temporary standards implementation plan. It was also noted that there would be no schedule to keep things moving along, which has not been followed currently. Chris Pfahl said that it would be a disincentive without the schedule in place.

In response to comment one, it was good to see that ASARCO acknowledged that many of the delays are attributable to ASARCO and that these are well documented. The submittal of annual reports and work plans were often late and is well documented that those late submittals created late approvals because of the specified timeline in the implementation plan to review and approve those plans within 30 days of submittal. At times when DEQ was approving the plans and meeting the deadlines, the USFS would often be tardy reviewing the plans by months which is documented. With regard to the particular work plan mentioned by Chris Pfahl, ASARCO submitted the work plan on time, DEQ provided comments on April 28th. Based on the comments, ASARCO was not happy with what needed to be done with the Paymaster repository and proposed to do something else. At that point, DEQ indicated that ASARCO's alternate proposal was not acceptable based on new information that had to do with arsenic and the potential to mobilize arsenic through the use of lime amendment. There was not enough data to comfortably move that forward. DEQ wanted ASARCO to stay with the original proposal, which was to cap the repository with synthetic materials. Based on this, DEQ and USFS met with Chris Pfahl early in June and ironed out the action items that needed to take place to get this off the ground. On July 9th, all the actions had been addressed on all sides of the table, so the project

was ready to move forward regarding the technical issues. In mid-August, DEQ received an electronic copy of the finalized work plan with a note attached indicating that the operation and maintenance plan, which was a requirement in DEQs original comments, would be submitted to DEQ prior to the commencement of work. DEQ will not approve the work plan until all of the comments were addressed, one of which was that the operation and maintenance plan for the Paymaster repository must be submitted with the work plan. On September 1st, DEQ received the final copy of the work plan and it did not have the operation and maintenance plan in it. However, because of the prior note indicating that it would be provided prior to the commencement of work, DEQ did not think much of this at this time. On September 18th at the public meeting Chris Pfahl asked why DEQ had not approved the work plan yet. DEQ received the operation and maintenance plan on September 26th and had approved it on September 28th conditional on one minor item, so DEQs response was very prompt as per DEQ protocol.

In response to two, DEQ agrees with ASARCO in that the repeal of the temporary standards will have little effect on moving this project forward. In response to the third comment regarding this repeal as a disincentive to do anything, DEQ finds this conflicting with ASARCOs comment that this project is going to move forward regardless of the temporary standards and implementation plan schedule. Based on the Governor's mandate that something is going to be done in the Upper Blackfoot and DEQ and other state agencies involvement with the ECA, along with the USFS priority of this, this project is going to move forward and there is plenty of incentive for everyone involved. With the disincentive as far as the schedule, ASARCOs Chapter 12 bankruptcy trustee has told them that they will not seek any funding for anything outside their corporate interests. The remaining 90% of the work out there on the schedule falls on public USFS lands. ASARCO will concur that they will not step foot off their own land. There is not a schedule that could be developed that would include all of the original lands that fall under the original implementation plan with ASARCO being the one petitioning for these standards. Their ability to meet any schedule that is outside their own property is a moot point. DEQs comments are in draft form and will be finalized by November 15th in time for the package that goes out the BER.

Earl Salley asked if any work has taken place.

David Bowers said that there was a small removal done as per the work plan for the Upper Mike Horse which goes back to 2004. ASARCO worked extensively in the fall of 2004 removing 16,000 cubic yards, did not do anything in 2005 because of the bankruptcy announcement, and this year they removed 300-400 cubic yards of tailings, regraded, brought in backfilled, and treated some of the soils in the Upper Mike Horse. The remaining work being done this year has to do with the expansion and modifications of the Paymaster repository, which is what caused the technical concerns. This work is currently halted due to weather but the surface is prepped and may not be completed until next spring depending on the weather.

Another thing that was noted in ASARCOs public comment reads "And finally, we believe that the repeal will have little effect on moving this project forward other than affecting ASARCOs permit. Clearly, once the temporary standards are repealed, our permit will have to have discharge limits associated with the B-1 standards that it will go back to. The system that we have in place won't meet those permits. Everybody knows that. They knew it when we built it. We're prepared though, in the event that the Department does choose to repeal the temporary

permits, to install a mechanical water treatment system that will meet the new permit limits. That is the only real net outcome of taking this away.”

Terry McLaughlin asked if DEQ felt this is moving in a positive direction now or still in a stalemate.

David Bowers said that from a Super Fund Section and Site Response Site Section perspective, this is moving in a positive manner.

Bob Bukantis said that the Department’s position at this point to support the repeal of the temporary water quality standards because DEQ thinks the issue is going to be addressed on the super fund front. DEQ is not seeing the progress necessary to support continuing keeping the temporary standards in place.

Briefing on Ambient Monitoring in MPDES Permits

Bonnie Lovelace said that a comment was made to Matt Clifford about how DEQ was handling ambient monitoring in MPDES permits. This comment generalized DEQs approach to ambient monitoring by indicating that DEQ really did not have the authority to blatantly ask for monitoring in these permits for ambient monitoring. This was a very strong over generalization. DEQ needs some justification and it has to be matched to what is being done in the permit.

Tom Reid explained the DEQ can and does require ambient monitoring in wastewater permits.

Kathleen Williams asked to define ambient monitoring characterized against regular kinds of monitoring.

Tom Reid said that ambient waters are waters of the state. Most of the limits set in discharge permits are set as effluent limits based on certain calculations or rules and require monitoring on a set basis on the effluent prior to its discharge into state waters and is compliance monitoring. Ambient monitoring is sampling the receiving water upstream and/or downstream of the discharge point. DEQ did drop ambient monitoring out of the Missoula permit. The reason DEQ dropped the ambient monitoring is that numeric water quality standards were set for the Clark Fork River establishing a set waste load allocation. One of the reasons ambient is required in MPDES permits is in cases where DEQ has to interpret a narrative standard. DEQ can require ambient monitoring and, in most of the permits, DEQ does require this. Setting up ambient monitoring can set up a conflict in the permit because a permit holder may violate the effluent limit but it does not have an impact downstream that is adverse. If DEQ calls the ambient monitoring the compliance monitoring point and there are limits set on the effluent it compromises DEQs ability to take enforcement actions because DEQ has established two criteria. DEQ has to reevaluate when to require ambient monitoring. This will be addressed in the permit writer’s manual. There are rules that guide DEQ on when and where to require ambient monitoring and put some conditions and limitations on DEQs ability to require ambient monitoring.

Matt Clifford said that the Missoula permit has been getting monthly nutrient numerical samples above and below the plant. It has been really helpful to get an idea of what is coming downstream above the plant to see what effect the plants discharge is having on the receiving water. The concern is that when there are nutrients in a changing environment there is a continually changing picture in the in-stream standard. It seems helpful and maybe essential to have an idea of what the ambient concentrations are above and below the plant so a new permit limit can be set in the future. It would be useful to have a look at the guidance written on determining when to require ambient monitoring. It is very important to require ambient monitoring for nutrients to be able to provide good protective effluent limits and get an idea of what is going on in-stream and have good water quality standards.

Tom Reid said that on the Missoula and other permits being issued now, DEQ has increased the monitoring burden on the permittees in terms of their effluent characterization, organics, metals, etc. This increase in effluent monitoring is done in order to be in compliance with federal requirements for MPDES permits. DEQ looked at where they could reduce the permittees monitoring burden to help balance out the cost of monitoring. The Water Quality Act also mandates the Department to monitor the quality of ambient waters. The monitoring is a shared responsibility between the state and the permittee.

Bonnie Lovelace said that Missoula did indicate that because of their commitment to the Tri-state Water Quality Council, they would continue a lot of the monitoring even though it is not linked to the permit. DEQ needs to link ambient monitoring requirements to the needs of the permit.

Bob Bukantis said that DEQ has been working on developing numeric nutrient standards for the state. At the next in-person WPCAC meeting DEQ wants to bring these standards up as a briefing item.

Kathleen Williams said that in the places where the permittees are not doing ambient monitoring anymore, is it true that other efforts are taking the place of that or is it creating a gap in the information base? Is DEQ picking up on this or is this source of information being lost? Unlike Missoula where someone is picking up on the monitoring, what about the other places?

Tom Reid said that the ambient monitoring has never had enough data. It is expensive and there are different ways of sampling it. DEQ does have a monitoring section that is charged with supporting TMDLs and monitoring ambient waters. Permits often lack the data that is needed. In the case of Bozeman, EPA wanted it to fill up because they felt that there was inadequate data to complete the 305(b) assessment, but DEQ felt there was enough data for permit limits and mixing zones so dropped the requirement for ambient monitoring. Mixing zones are another reason why DEQ collects ambient data. Not requiring ambient monitoring does create a gap but there are other ways of getting at it other than requiring it through the permit. Two to three years before renewing a permit, EPA issues a 308 letter asking the facility to start collecting data. DEQ is considering using this method to help fill in the gap.

Bob Bukantis said that DEQ does have severe resource limitations in terms of getting the sort of data needed. DEQ is just finishing a 5-year fixed station monitoring network data

collection effort of biological and water chemistry data at 38 sites around the state. This data collection was not targeted at specific wastewater treatment plants. Most of the monitoring effort has been directed in cleaning up the 303(d) list in support of TMDL development.

Roger Muggli said that one of the monitoring disconnects is on the Tongue River, which has a monitoring station for quality and quantity at the state line and there are discharge points above the reservoir that critically affect the water quality of the Tongue River reservoir. This cumulative affect may get out of control. There is no monitoring below the last CBM discharge point before the reservoir.

Tom Reid said that the CBM discharges are required to do ambient monitoring above and below all the discharges because it is a complicated situation. Fidelity is required to do ambient water quality and biological monitoring below the discharges. It is also occurring below the reservoir as well.

Roger Muggli said that there is concern about having the permittees doing that monitoring and it needs to be done on the state level. In the feed industry, feed sampling must be done by the state.

Karen Sanchez asked how is ambient ground water monitoring addressed for all the subdivisions and septic tanks?

Tom Reid said that DEQ issues a discharge permit for systems installed after 1998 and discharges more than 5,000 gallons/day for subdivisions that have community wastewater systems. These systems do require ambient down gradient monitoring and some up gradient monitoring for these permits. For subdivisions that go in that have individual systems, they are not subject to the permit regulations so DEQ does not see them.

Bonnie Lovelace said that there are other entities that do ground water monitoring, such as Bureau of Mines and Geology. There are still gaps in the ground water monitoring like there is with surface water monitoring.

Action Items

Concentrated Animal Feeding Operations Deadlines Change

Kari Smith said DEQ is seeking recommendation to proceed with initiating rulemaking with BER. The information the Council received contains simple edits that include the revised CAFO regulations that were promulgated in 40 CFR 412 and 122. Amendments were made to the 2003 federal rule, which DEQ adopted by reference in December 2005. During that adoption time, EPA revised the rules again and extended deadlines for compliance responsibilities that were stated in the 2003 rule. In order for DEQ to keep the state rules consistent with the federal rules, DEQ needs to revise the rules and extend those deadlines. The rule that was adopted in February 2006 by EPA was actually finalized the date of publication because it relieved compliance responsibilities of permit holders. In the notice of public hearing for the proposed

amendment, DEQ is proposing that a public hearing would not be needed because it makes DEQs rules consistent with the federal rules and not more stringent.

Terry McLaughlin said the extension of the deadlines seeking permit coverage and the requirement to develop and implement the nutrient management plans fall on the same date. Does DEQ anticipate that there would be any problems with the agricultural side with everything falling on the same date?

Kari Smith said the dates were proposed in response to the Second Circuit Court of Appeal's decision that was made in October of 2005. The deadline that dealt with operators that must seek permit coverage was an item that was to be further addressed in EPA regulations. Currently, the rules proposed in August are still out for public comment and will address the obligation of CAFO facilities that need to either seek coverage based on a change of operation status or seek coverage simply because they are a large CAFO. Those items propose that if the facility is not proposing to discharge, they would not need to seek coverage. As the state rules stand now, facilities that are currently permitted would have a responsibility to submit a nutrient management plan by the end of December 2006. This is the deadline that is causing problems. In order to issue a new general permit and proceed with requirements of the nutrient management plan, DEQ needs to extend the deadline to July 2007 to be consistent with the federal regulations. The only item of these rules that is of great importance is the nutrient management plan. EPA did not see this as something that required public participation because it actually relieved permit holder of compliance responsibilities. If DEQ is adopting federal rules by reference, when EPA extends deadlines, DEQ needs to be prudent and extend state deadlines.

Mike Wendland said there is a concern that the producers that have done their CAFO permitting and met the targets and requirements want the rule to stand forever and do not want to have a date change and more rules they have to abide by for their operation.

Kari Smith said that any time the CAFO rules are amended or revised, there has been a fear that there is content in the rule that is changing. The rules stand just as they were in 2003 at this point. DEQ's rules are consistent with the federal rules with the exception of these deadlines. These deadlines will actually give producers more time. If a producer has already submitted and is working on a nutrient management plan, these deadlines will not affect those producers. These are the deadlines that will give them until the end of July 2007 (if they are currently permitted) instead of the end of December 2006. For facilities that are yet to be permitted will have also have time to put that nutrient management plan together. It is not a change in content; the rules themselves have not changed. It is just an extension of time in order to get that information in. Currently, EPA is addressing and revising their 2003 CAFO rules in response to the Second Circuit Court of Appeals. That is not finalized and complete. The information is available on the EPA website as far as any content changes to the rules. That is where it goes back to the owner and operators' duty to apply and seek coverage. That is one requirement that, unless the facility proposes to discharge, they are not required to seek coverage.

Terry McLaughlin asked if there is a chance that EPA may make some substantive changes to the CAFO rules that could come back and require some additional constraints.

Kari Smith said that it is not additional constraints. One of the largest issues that was addressed in the Second Circuit Court of Appeal was the responsibilities of facilities defined as a CAFO.. The original 2003 CAFO rules said that those facilities had a deadline that they would have to submit an application for permit coverage or they would have to submit a no potential to discharge, which was in a sense a permit. EPA's position was that these facilities discharge and needed a permit. The Second Circuit Court of Appeals ruled on that and vacated that portion by saying that the Clean Water Act (CWA) did not have that authority. So unless a facility was proposing to discharge, it did not need to seek permit coverage. This is lessening some of the restrictions that were in the 2003 rule. They are reducing some of the requirements. It would not require a facility to change the way they are operating.

Matt Clifford said it is a good thing that the state rule be consistent with the federal rule. DEQ should not assume that just because they are extending a deadline and it is "beneficial" to use that to decide that a public hearing is not needed. There is another side to the issue. These rules do protect public resources and there are members of the public that are interested in it and may want a hearing on it.

Kari Smith said that in the proposed rule notice that if there is 10% of the regulated community or 25 people that have an interest in this and would like further discussion, then DEQ will have a public hearing.

Kathleen Williams asked if there was a statute that says that the state cannot have any regulations that are more stringent than federal, then there is no option here with making the proposed amendments is there?

Kari Smith said that it is a whole criteria that can be followed if DEQ needs be more stringent to protect human health and the environment, but in this DEQ does have a responsibility to have the state rules consistent with the federal regulations.

A motion was made and seconded to take the proposed rulemaking forward to the Board without official comment from the Council. All approved the motion. The motion carried as submitted.

Meeting Date for First Meeting for Next Calendar Year

Bob Bukantis said the WPCAC meetings are ideally scheduled a month before the Board meetings. The Board does not yet have a calendar for next year. DEQ would like to propose the first meeting for WPCAC for 10:00 a.m. January 4, 2007. The best guess for the Board's first meeting will be January 26, 2007, although it may be January 19th or February 2nd. At the time of the next meeting, the calendar can be set for the remainder of the year.

Terry McLaughlin said that DEQ should go ahead and use January 4th 2006 as a tentative date and stay with it unless there is a compelling reason to shift it.

General Public Comment on Water Pollution Control Issues

There were no additional comments from the public.

Agenda Items for Next Meeting

Agenda items recommended for the next meeting include the election for chair next year and an update on the Gallatin ORW rulemaking.

Terry McLaughlin adjourned the meeting at 11:30 a.m.